Supreme Court, U.S.
FILED
MAR 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRE DU LAC ASSOCIATION, INC.,
Cross-Petitioner,

vs.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Cross-Respondents.

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

KENTON E. KNICKMEYER
One Mercantile Center
Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Counsel for Cross-Petitioner, Terre Du Lac Association, Inc.

Of Counsel:
ROBERT H. BROWNLEE
MICHAEL J. MORRIS
THOMPSON & MITCHELL
One Mercantile Center, Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

TABLE OF CONTENTS

	Page
Table of Authorities	i
Introduction	1
Argument	2
Conclusion	4

TABLE OF AUTHORITIES

Cases:

United States v. Bankers Trust Co., 294 U.S. 240 (1935)	4
United States v. Nixon, 418 U.S. 683 (1974)	4
United States v. United Mine Workers, 330 U.S. 258 (1947)	4
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 937 (1952)	4

Statutes:

28 U.S.C. §1254(a)	3, 4

No. 85-1331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

TERRE DU LAC ASSOCIATION, INC.,
Cross-Petitioner,

vs.

TERRE DU LAC, INC., TERRE DU LAC GOLF & COUNTRY CLUB, INC., TERRE DU LAC COUNTRY CLUB ASSOCIATION, a limited partnership, C.I.T. CORPORATION, SENSIBAR ENTERPRISES, INC., MO-ILL, LTD., and JAMES O. KWON,
Cross-Respondents.

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

I. INTRODUCTION

Cross-Respondents (the Defendants in the District Court) assert two erroneous propositions in their Brief in Opposition to Cross-Petition for Writ of Certiorari ("Defendants' Br."):

1. That the Cross-Petition is premised on a decision by the court below that allows Cross-Petitioner, Terre Du Lac Association, Inc. (the "Association"), to assert the individual RICO claims of its members, and

2. That the Defendants did not, and (presumably) as a matter of law could not, petition the Court to review an

> aspect of the Court of Appeals' decision that is assertedly favorable to Defendants.

Defendants' Br. at 4.

The Association submits this reply brief to dispel any doubt concerning the basis for its Cross-Petition.

II. ARGUMENT

A. Defendants' Petition For Certiorari First Raised The Issue Of The Association's Standing To Sue Under RICO

The Association did not state or imply in the Cross-Petition that the Court of Appeals had addressed, much less resolved, the issue of the Association's standing to assert RICO claims on behalf of its members. To the contrary, the Cross-Petition clearly explains that the Court of Appeals never reached this issue. Instead, that court erroneously concluded that the Association did not contest the District Court's adverse ruling thereon. Cross-Petition at 6, n.2; *see* App. at A-9.

The Association refrained from petitioning for rehearing or for certiorari "to correct" this mistake. Defendants' Br. at 4. The conclusion of the Court of Appeals' opinion, which states: "We...reverse the dismissal of the RICO (count fifteen) and antitrust claims (count sixteen)...." (Cross-Petition, App. A at A-15), without limiting the reversal to the claim asserted by the Association in its own right made such a petition unnecessary.

The Defendants were not, however, content with the Court of Appeals' opinion. Their Petition for Certiorari in Docket No. 85-1169 frames the questions presented to encompass the entire issue of the Association's standing to sue under RICO. Presumably, Defendants so framed their Petition because they

sought a decision from this Court that addressed the Association's standing to pursue Count Fifteen of the Amended Complaint in its entirety, as did the Court of Appeals' order reversing the dismissal of that Count.

B. A Prevailing Party In The Lower Courts May Seek Review Of The Decision Favorable To Themselves Through A Petition For Certiorari

Now that they have reviewed the Cross-Petition, Defendants realize that their strategy creates a vehicle for review of the issue of associational standing to pursue the Interstate Land Sales claims, as well as the RICO claims. Defendants erroneously seek to avoid this consequence by claiming that they "could not" petition this Court to review the associational standing issue under RICO.

Defendants' Brief does not elaborate on the basis for this contention. It apparently stems from Defendants' present assertion that they prevailed on the issue of associational standing under RICO in the Court of Appeals, and their unsubstantiated assumption that a prevailing party cannot petition for certiorari. As explained above, it is not at all clear from the Court of Appeals' opinion that Defendants did prevail on the issue of associational standing under RICO. It is clear, moreover, that a prevailing party can seek certiorari.

The right to petition the Court for a writ of certiorari is defined by 28 U.S.C. § 1254, which states, in relevant part:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) by writ of certiorari granted upon the petition of *any* party to any civil or criminal case, before or after rendition of judgment or decree....

28 U.S.C. § 1254 (emphasis supplied). The right to petition for a writ of certiorari is not limited to parties aggrieved by the outcome of a case in the court of appeals or the district court. The sole statutory limitation on standing to petition this Court for a writ of certiorari is that the petitioner be a party. *See, e.g., United States v. Bankers Trust Co.*, 294 U.S. 240, 243 (1935) (petition filed by prevailing party); *United States v. United Mine Workers,* 330 U.S. 258, 269 (1947) (petition filed by prevailing party); *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 937 (1952) (petitions filed by prevailing and losing parties, both petitions granted); *United States v. Nixon,* 418 U.S. 683, 686-87 (1974) (petition filed by prevailing and losing parties, both granted). The fact, if it is one, that Defendants prevailed in the Court of Appeals on any aspect of the RICO claims does not preclude them from seeking review of those aspects of the Court of Appeals' decision on which they prevailed, in addition to those aspects on which they lost.

III. CONCLUSION

The Association's cross-petition for certiorari is premised upon the fact that Defendants themselves raised the broad issue of the Association's standing to sue under RICO. A necessary sub-issue within this broad standing question is whether the Association has standing to assert RICO claims not only on its own behalf, but also on behalf of its members. Since the basic principles governing such associational standing are identical regardless of the cause of action asserted, the Association has requested this Court to consider the propriety of such standing in this case under both RICO and the Interstate Land Sales Act.

While Defendants may now be unhappy with the consequences of the broad standing question which they chose to present for this Court's review, the fact remains that this issue can-

not be resolved completely in this case without also considering the narrower associational standing issue identified the cross-petition.

Respectfully submitted,

Kenton E. Knickmeyer
One Mercantile Center, Suite 3400
St. Louis, Missouri 63101
(314) 231-7676

Counsel for Terre Du Lac Association, Inc.

Of Counsel:

Robert H. Brownlee
Michael J. Morris
Thompson & Mitchell
One Mercantile Center, Suite 3400
St. Louis, Missouri 63101